the general practice was a complaint that the appellant had been denied an opportunity to amend her statement of claim in the course of the trial before Mr Justice Chua. The case as originally pleaded on behalf of the plaintiff, who unfortunately had lost her memory and therefore was not able to give evidence herself about the circumstances in which this accident happened, set out that she had been standing on the grass verge waiting to cross the road and it was there that the defendant motor cyclist collided with her. In the course of the trial an application was made to amend that pleading to allege alternatively that the accident occurred, as of course on the judge's findings it did, when the plaintiff was crossing the road; but it is noteworthy that the particulars of negligence alleged against the defendant motor cyclist were no different in the proposed amendment from the original pleading in the statement of claim. If their Lordships had thought that the judge's refusal to allow this amendment had in any way affected the outcome of the trial, then possibly (it is unnecessary to say more than that) this case might have been considered as falling within the ambit of the exceptions to the rule against entertaining appeals from concurrent findings of fact.

Their Lordships are quite satisfied that nothing in the event turned on the pleading point. This is not a case where the judge said 'I dismiss the plaintiff's case because the only case pleaded is that she was standing on the grass verge when the accident happened and that case has not been established'. On the contrary, he went into the facts very fully and found as already stated that the accident happened when the plaintiff, having set out to cross the road, then suddenly, as already described, turned back and effectively walked into the path of the motor cyclist, so that the judge's refusal to allow the proposed amendment in the event did not influence the result in any way.

This case falls to be decided as one which falls fairly and squarely within the practice of this Board not to entertain appeals against concurrent findings of the two courts below. Accordingly the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Le Brasseur & Monier-Williams*; *Barlow Lyde & Gilbert.*

Reported by *Terence Tan Bian Chye*

SINGAPORE REPORTS

Algemene Bank Nederland NV v Loo Choon Yow

HIGH COURT (SINGAPORE) – BANKRUPTCY NO 396 OF 1988
CHAN SEK KEONG J
15 MARCH 1989

Evidence – Burden of proof – 'Debtor' within the Bankruptcy Act – On whom duty to prove change of domicile lay

Bankruptcy – Whether within definition of 'debtor' under the Bankruptcy Act – Whether debtor had changed domicile – Bankruptcy Act (Cap 20, 1985 Ed), s 3(3) – Bankruptcy Rules 1967, rr 17, 25 & 122

The petitioning creditor had obtained judgment against the judgment debtor but following the latter's failure to pay the debt, a bankruptcy notice was served by the petitioning creditor against the judgment debtor. The bankruptcy petition was then filed. Paragraph 2 of this petition stated that the judgment debtor had for the greater part of six months preceding the presentation of the petition resided in Singapore, within the jurisdiction of the court. The bankruptcy notice and petition were both served on the judgment debtor by way of substituted service through advertisement in the newspapers. LCB, the judgment debtor's brother, then filed an affidavit in which he deposed that he had personal knowledge that the judgment debtor was not residing in Singapore since late 1985, that he had married a Taiwanese lady and since 1985 had been domiciled and residing in Taiwan and did not own any dwelling house or have a place of business in Singapore. Another person, CKK, an accountant, who said that he had handled the judgment debtor's financial affairs since the judgment debtor had left Singapore, also filed an affidavit confirming the affidavit of LCB.

Held, granting the petition:

(1) The burden was on the petitioning creditor to satisfy the court that the judgment debtor was a debtor for the purposes of s 3 of the Bankruptcy Act but this burden had been discharged by reference to the judgment debtor's passport and to another exhibit (a certificate issued by the Trade Mission of the Republic of China in Singapore) produced by the judgment debtor which showed that he was born in Singapore and that he was a Singapore citizen.

(2) The affidavits of the judgment debtor's witnesses were rejected on the grounds that they were hearsay. Whether the judgment debtor had changed his domicile was a matter within the personal knowledge of himself, so the witnesses could not say that they had personal knowledge of this matter.

(3) As regards the statements that the judgment debtor had married a Taiwanese lady, had a son and purchased a house in Taiwan with the intention of residing there permanently, no documentary evidence was produced to show any of these facts.

(4) The judgment debtor's passport showed that he had travelled extensively to many countries from 1985 to 1988. But frequency of travel does not prove a change of domicile nor did the judgment debtor himself so allege.

(5) The judgment debt was not denied, the petitioning creditor had discharged the burden of proving that the judgment debtor was a debtor at the time the bankruptcy notice

was served on him, and the judgment debtor had failed to adduce evidence that he had changed his domicile at the relevant time, a receiving order and an adjudicating order was therefore made against the judgment debtor.

Cases referred to

1 *Re Amos William Dawe* [1980] 1 MLJ 200 (distd)
2 *Ex parte Barne* (1886) 16 QBD 522 (refd)
3 *In re A Debtor* [1978] 1 WLR 1512 (folld)

Legislation referred to

Bankruptcy Act (Cap 20, 1985 Ed) s 3(3)
Bankruptcy Rules 1967 rr 17, 25, 122

Morris John for the petitioning creditor.
Roy Kumar for the judgment debtor.

Cur Adv Vult

Chan Sek Keong J: At the conclusion of the hearing of this bankruptcy petition on 6 March 1989, I made a receiving order and an adjudicating order against the judgment debtor ('LCY') and said I would give my written grounds later. On the same day, counsel for LCY requested a further hearing on the ground that he had misunderstood the ruling of the court as to the admissibility of certain affidavits filed in support of LCY's opposition to the petition. I granted the request and the further hearing took place on 8 March 1989. After hearing submissions, I made the same orders against LCY.

The issue before the court was whether LCY was a debtor for the purpose of s 3(3) of the Bankruptcy Act (Cap 20, 1985 Ed). Section 3(3) provides as follows:

> In this section 'debtor' shall be deemed to include any person, whether a citizen of Singapore or not –
> (a) who is domiciled in Singapore;
> (b) who within a year before the date of presentation of the petition has ordinarily resided in or had a dwelling house or place of business in Singapore; or
> (c) who though not himself personally within Singapore carries on business by an agent within Singapore.

The petitioning creditor ('ABN') had on 9 March 1987 in Suit No 2742 of 1986 obtained judgment against LCY in the sum of $247,942.54. The judgment debt was not paid and on 9 February 1989, ABN issued a bankruptcy notice against LCY. The notice was served on LCY by substituted service by way of an advertisement published in the *Straits Times* on 10 March 1988. The bankruptcy petition was filed on 28 March 1988. Paragraph 2 thereof stated that LCY had for the greater part of six months next preceding the presentation of the petition resided at Dido Street, Singapore 1545 within the jurisdiction of the court. The petition was also served on LCY by substituted service on 3 May 1988 by advertising the same in the Straits Times.

On 14 September 1988, LCY's brother ('LCB') filed an affidavit in which he deposed that he had personal knowledge that LCY had not been residing in Singapore since late 1985, that he had married a Taiwanese lady and since 1985, had been domiciled and residing in Taiwan and did not own any dwelling-house or have a place of business in Singapore. On 13 October 1988, LCY filed an affidavit exhibiting a copy of his passport which, he asserted, proved that he had left Singapore and had not returned for more than 30 months.

On 25 November 1988, ABN, after a hearing before the assistant registrar at which LCY was represented by his solicitor, obtained an order directing LCY to appear and be cross-examined before the assistant registrar on a date to be fixed by the registrar. At the date so fixed, ie 21 February 1989, LCY failed to appear but was again represented by his solicitor. As a result, the assistant registrar made an order that the affidavit of 13 October 1988 of LCY should not be used in evidence without the leave of court.

On 3 March 1989, one Chay Kwok Kee, an accountant who said that he handled the financial affairs of LCY in Singapore since LCY left Singapore, filed an affidavit confirming the contents of LCY's affidavit and LCB's affidavit of 15 September 1988. In the affidavit, Chay offered himself for cross-examination on his deposition.

On 3 March 1989, LCB filed a second affidavit again deposing that he had personal knowledge that LCY had lived in Taiwan since August 1985 and intended to live there indefinitely for the following reasons: (a) since August 1985, he had resided in Taiwan with his family comprising a Taiwanese lady and a son aged four; (b) his son is a Taiwanese citizen and he owns property in Taiwan. In his affidavit, LCB also offered himself for cross-examination.

On 4 March 1989, the solicitor for LCY filed an affidavit in which he exhibited (MKR-1) a copy of a certificate in Chinese issued by the Trade Mission of the Republic of China in Singapore on 5 February 1986. The said certificate (as correctly translated into English) gave the following particulars of LCY:

Nationality	: Singapore
Native of	: Nan An, Fujian
Sex	: Male
Date of Birth	: 4 May 1951
Occupation	: Student
Status	: Singapore Citizen
Passport issued by	: Immigration Department, Singapore
Date of Issue	: 29 July 1985
Expiry Date	: 29 July 1986
Date of arrival at destination	: Born in Singapore
Address	: 11-04, Hong Kong Bank Building, 21 Collyer Quay, Singapore 01
Reference Number Document for permission to stay	: Singapore NRIC 0092081Z

On the morning of 6 March 1988, ie the date of hearing, LCB filed a third affidavit deposing that LCY had no intention of coming back to Singapore and was in Taiwan with the intention of residing there indefinitely for the following reasons: (a) LCY was gainfully employed in Taiwan; (b) since 1985, he has set up a matrimonial home in Taiwan with his wife and son aged four; (c) he has purchased a house as his home in Taiwan; (d) since LCY is a Chinese, the language, ethnic, cultural and religious background of Taiwan would easily enable him to blend into the society and settle down in Taiwan; and (e) he has lost all his savings in Singapore due to the Pan-Electric stock market crash and finds Singapore less financially favourable to live in. LCB further deposed that sometime in August '1988', his father applied for LCY's son to come to Singapore (and that the son came) but LCY himself did not enter the jurisdiction. Exhibited to this affidavit marked LCB-2 is a copy of the application form in Chinese and a translation in English. These two documents are identical to those exhibited in MKR-1, LCY's affidavit of 3 March 1988.

Counsel for ABN objected to the last four affidavits referred to above being admitted in evidence on two main grounds: first, that they were filed in non-compliance with Bankruptcy Rules 17, 25 and 122 and second, that they were filed with a view to circumventing the order of court of 25 November 1988 and for that reason the court should not allow them to be read unless LCY appeared to be cross-examined on the statements made on his behalf by LCB and Chay. Counsel later modified his objection by consenting to the affidavit of 3 March 1989 of LCY's affidavit being admitted so that he could refer to exh MKR-1.

Counsel for LCY submitted that the court should exercise its discretion to allow all the affidavits to be admitted since they did not contain any fresh evidence which had not been placed before the court in the affidavit of LCY and that the court was under a duty to take cognisance of all the facts.

I did not agree with the submissions of counsel for ABN on Bankruptcy Rules 17 and 25. I did not think they applied to this case. As regards the alleged non-compliance with Bankruptcy Rule 122, I was of the view that ABN had not been prejudiced since they had always been aware of LCY's intention to object to the petition. I ruled that any objections to the admissibility of the said affidavits should be taken when they were read, whether on the ground that the evidence infringed the hearsay rule or on the ground that they related to matters of personal knowledge on which LCY should be cross-examined.

Counsel for ABN then made a short submission that as there was evidence before the court that LCY was domiciled in Singapore before he went abroad in 1985, the court had jurisdiction in bankruptcy unless LCY adduced evidence that he had changed his domicile at the relevant time and that since there was no such evidence before the court, receiving and adjudicating orders ought to be made against him.

In regard to the desirability of having LCY present in court for cross-examination, counsel for ABN referred to the decision of the Court of Appeal in *Re Amos Dawe*.[1] In that case, Dawe was adjudicated a bankrupt on 27 October 1978. On 5 February 1979, he applied to have the receiving and adjudicating orders made against him rescinded and annulled on the ground that the court had no jurisdiction to make him a bankrupt as he was not a debtor as defined in the Act, he not having resided in Singapore since 5 November 1975.

Both the bankruptcy notice and the bankruptcy petition were served on Dawe by substituted service by way of advertisement in the Straits Times on 16 May and 7 October 1978 respectively. The learned Chief Justice found as a fact that Dawe was aware of the bankruptcy proceedings commenced against him. Counsel for Dawe submitted that the bankrupt had satisfied the burden of proving that he was not domiciled in Singapore and that he had not within a year before the date of the presentation of the petition or hearing, resided in or had a dwelling house or a place of business in Singapore. The learned Chief Justice declined to accept Dawe's affidavits unless Dawe appeared to be cross-examined. Upon counsel indicating that Dawe would not be present, the learned Chief Justice dismissed his application.

Counsel for LCY sought to distinguish *Re Amos Dawe*[1] on the ground that in that case Dawe had the burden of satisfying the court that he ought not to have been adjudged a bankrupt and that he failed to discharge such burden when his affidavits were not accepted by the learned Chief Justice whereas in the present case the onus was on the petition creditor to satisfy the court that LCY was a debtor for the purpose of s 3 of the Bankruptcy Act. In my view, ABN was able to discharge this burden by reference to the passport of LCY and/or exh MKR-1 (see *Ex parte Barne*[2] where the debtor had unwittingly brought himself within the jurisdiction of the court by filing an affidavit denying residence but admitting that he was born in England). Both the passport and the exhibit showed that LCY was born in Singapore and that he was a Singapore citizen. The passport itself is valid up to 29 July 1990.

At the further hearing, counsel for LCY sought to admit the affidavits of LCB and Chay to prove that LCY had changed his domicile to Taiwan by virtue of the matters set out therein of which the said deponents claimed they had personal knowledge.

I rejected the affidavits of LCB and Chay on the ground that their evidence was hearsay. Counsel for LCY

submitted that the court should allow LCB and Chay to be cross-examined in order to explain their beliefs and also to clarify certain aspects of LCB's statement. Counsel for ABN did not accept the offer, quite rightly, in my view, since I did not see how LCB and Chay could say that they had personal knowledge that LCY had changed his domicile of origin as this was a matter which was within the personal knowledge of LCY. As Buckley LJ said in *In re a Debtor* [3] at p 1515:

> Under s 4(1)(d) (ie the Bankruptcy Act 1914) the question arises whether the debtor is domiciled in England or whether within a year before the date of the presentation of the petition he was ordinarily resident in England or had a dwelling house or place of business in England, or carried on business in England personally or by means of an agent or manager. These are questions the investigation of which must involve consideration of the debtor's state of mind at the relevant time; they are matters which give rise to subjective questions on the debtor's state of mind.

As regards the statements that LCY had married a Taiwanese lady, had a son and purchased a house in Taiwan with the intention of residing there permanently, no documentary evidence was produced to show when and where the marriage took place, where the son was born and when LCY purchased the house.

LCY has filed only one affidavit in these proceedings, ie on 13 October 1988. This is the affidavit which, by the order of the assistant registrar, could not be used without the leave of the court. Paragraphs 3 and 4 of this affidavit state:

> 3 I wish to draw this honourable court's attention to the fact that it can be seen from my passport that I have left Singapore and have not returned for more than 30 months.
> 4 In the premises, I am advised and verily believe that I am not a debtor within the Bankruptcy Act as defined under s 3(3).

It is apparent from these two paragraphs that LCY was directing his mind to rebutting ABN's allegation that he was within the jurisdiction of this court in terms of s 3(3)(b) of the Act, ie the allegation that he was within a year of the presentation of the petition ordinarily resident in Singapore. In the same affidavit, he did not claim to have acquired a residence in Taiwan, Hong Kong, Malaysia or Thailand, much less a permanent residence with the intention of acquiring domicile in any of such countries. He also did not claim any of the other matters which were subsequently claimed on his behalf by LCB. If he had made such claims, it would clearly have been proper for ABN, in the circumstances of this case, to have applied for an order that LCY be cross-examined on his claims.

The passport entries show that he, from August 1985 to October 1988, travelled frequently in and out of the following countries, viz Hong Kong, Japan, Malaysia, Taiwan and Thailand. A breakdown of these trips shows that he was in Taiwan for the following periods in each year: August to December 1985 – four days; 1986 – 158 days; 1987 – 226 days and 1988 to August – 183 days. The rest of the time he spent in Hong Kong, Japan, Taiwan or Thailand. In my view, the passport entries prove what they say, ie he has travelled frequently in those countries in those years. By itself, the frequency of travel does not prove a change of domicile nor has LCY so alleged.

The law as to proof of change of domicile is set out in 8 *Halsbury's Laws of England* (4th Ed) para 432 as follows:

> There is a presumption against a change of domicile. The burden of proving any change of domicile rests therefore upon the person alleging it. A change of domicile is a serious matter, not to be lightly inferred, and it must be clearly and unequivocally proved. Differing views have been expressed as to the standard of proof, whether it is the normal civil standard, the balance of probabilities or some higher standard.
>
> The task of proving a change of domicile is particularly onerous when the domicile alleged to be displaced is one of origin as opposed to one of choice.

The allegation that LCY had changed his domicile was not made expressly by him but by LCB on his behalf. I have already stated that the evidence of LCB was hearsay evidence and not admissible. Furthermore, the knowledge claimed by LCB of LCY's change of domicile was suspect. In his affidavit filed on 15 September 1988, LCB stated (in para 4 thereof) that LCY had 'since 1985 been domiciled and residing in Taiwan'. He did not allege that the change of domicile occurred in 1986, or 1987 or 1988 but specifically in 1985. Since the documentary evidence showed that LCY from August to December 1985 had stayed in Taiwan for only 4 days, the court was being asked to infer that LCY had decided specifically in 1985 to make his permanent home in Taiwan. I found it quite impossible to make such an inference.

In my view, ABN had even a stronger case against LCY than the petitioning creditors had against their respective debtors in *Re Amos Dawe*[1] and in *In re a Debtor*.[3] In both these cases, the judgment debtors had filed affidavits to claim expressly that they had changed their domicile. LCY did not make any such claim in his affidavit.

For the reasons given above, I found that (a) ABN had discharged the burden of proving that LCY was a debtor at the time the bankruptcy notice was served on him and (b) LCY had failed to adduce any evidence to prove he had changed his domicile at the relevant time. As the judgment debt was not denied, I made a receiving order and an adjudicating order against LCY.

Order accordingly.

Solicitors: *Drew & Napier*; *Yong & Partners*.

Reported by *Terence Tan Bian Chye*